Supreme Court, U.S.
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No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Reduced to its essentials, this Court's decision in *City of Renton v. Playtime Theatres, Inc.* (*Renton*), 475 U.S. 41 (1986) stands for the proposition that local governments may constitutionally enact zoning regulations that apply only to adult businesses. As shown in the City of Los Angeles' (City) petition, the Court of Appeals fundamentally misapplied that principle, thereby creating a conflict with at least five circuit courts of appeals. The Brief in Opposition (Opposition), because it goes so far afield, supports the need for review by this Court to once again settle the right of municipalities to enact remedial zoning regulations "designed to serve a substantial governmental interest." *Renton*, 475 U.S. at 39.

This brief Reply seeks only to address what petitioner considers to be the four most glaring inaccuracies of the Opposition. Respondents make many comments about the content and meaning of the City's 1977 Study. Opposition at pp. 1-4. In the City's view these comments are inaccurate or incorrect and for the most part outside the record and thus irrelevant. This Reply Brief is not the appropriate vehicle for the City to respond line by line to respondents' comments about the 1977 Study. At this juncture, it is sufficient that the City's 1977 Study has been reviewed by numerous courts and found to be more than adequate to sustain very different zoning ordinances regulating adult businesses from the one at issue here, as well as the precise regulation challenged in this lawsuit. See, Petition at pp. 3-4 fn. 1 and p. 20.

In Part B of the Opposition (at pp. 8-9), respondents assert that review is not warranted on the basis of commercial speech jurisprudence, citing, *inter alia*, *Turner Broadcasting System v. F.C.C.*, 520 U.S. 180 (1997) (*Turner II*). Such reliance is misplaced. This Court has consistently stated that the analysis of zoning ordinances under *Renton* and commercial speech jurisprudence are separate and distinct strands of First Amendment jurisprudence. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-868 (1997); *Boos v. Barry*, 485 U.S. 312, 319-321 (1988). District Court Judge Atlas, in her 153 page decision, commented on the application of commercial speech jurisprudence to a First Amendment challenge to the City of Houston, Texas, zoning ordinance. She rejected the application of *Turner II* to zoning ordinances analyzed under *Renton* because it did not pertain to "controlling authority specifically related to the adult entertainment context." *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754, 799-780 (S.D. Tex. 1998). The same is true here, commercial speech jurisprudence is inapposite. The decision of the Court of Appeals does not follow this Court's decision in *Renton* and is in conflict with other circuits. It is on that basis that review is appropriate and the City's petition should be granted.

Very problematic is respondents' argument that review is not warranted because the City's definitions of adult businesses are "arbitrary." Opposition at p. 13. Respondents conceded in the Court of Appeals that they were not challenging the City's 1978 ordinance. Brief of Appellees at pp. 37-38. The definitions of the separate adult businesses found in the 1978 ordinance (Petition, Appendix E, App. 62-66) have not been amended since.

The constitutionality of these definitions was not challenged below, and in light of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Renton*, such a challenge would obviously be futile. This argument is improperly raised here.

Equally problematic is respondents' recantation of their prior waiver that an adult arcade cannot economically operate independent of an adult bookstore. Opposition at p. 6, ¶ 6 and footnote 5 at p. 13. It is thus disingenuous for respondents to assert that "the City presented no evidence whatsoever on this point." Opposition at p. 7. The City was at all times ready, willing and able to undertake discovery on that issue, at which point respondents entered into the now recanted "waiver." This argument is also improperly raised here.

As in the Court of Appeals (Brief of Appellees at pp. 43-44) , respondents resort to hyperbole when they assert that the City is somehow free to create ever new ingenious definitions of adult businesses, such as an adult business for books and then one for magazines[1]. Opposition at p. 12 and fn. 4. There is nothing in the record that the City has ever attempted to amend its adult zoning ordinance in the manner contemplated by respondents' whimsical flight of fancy. Such assertions or implications are irrelevant to the legal issue actually litigated, highly speculative and improperly raised here.

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[1] In Brief of Appellees the list of potential definitions was much longer and included such novel categories as "adult pencil stores" and "adult greeting card stores." Brief of Appellees at p. 43.

Lastly, respondents assert that the City's 1983 amendment restricting multiple uses in one building constituted a "drastic 1983 expansion of those restrictions (of the 1978 ordinance)." Opposition at p. 12. There is no evidence to support the idea that the 1983 amendment was "drastic," i.e., somehow preclusive. To reach such a conclusion, it must first be determined that the City's ordinance does not allow for reasonable alternative avenues of communication, the fourth step of the *Renton* test. Given *Renton*, that is what this lawsuit should really be about. It is an undertaking that the City is supremely confident that it can and will prevail on. This issue, however, was rendered moot when the District Court granted respondents' motion for summary judgment. Petition, Appendix B, App. 55. Otherwise, the 1983 ordinance is no more "drastic" than zoning ordinances regulating the location of adult businesses which have significantly different regulations from the one at issue here. See, e.g., the approved zoning regulations in *Stringfellow's v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (Sup.Ct. 1996), *aff'd*, 241 A.D.2d 360, N.Y.S.2d 812 (App.Div. 1997), *aff'd*, 694 N.E.2d 407 (N.Y. 1998), *cert. denied, sub nom. Amersterdam Video v. City of New York*, 525 U.S. 1067 (1999).

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, review by this Court is warranted and the petition should be granted.

Respectfully submitted,

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